nent domain is unwarranted and void; and that provision of the Constitution of the United States which forbids the state violating the obligation of contracts could not be so construed as to render valid and effectual such a bargain, which originally was in excess of proper authority. See also Id. 343; *Rd.* v. *Rd.*, 97 Ill. 506; *West River Bridge Co.* v. *Dix*, 6 How. 531. There are cases where the state might bind itself, and where it would be powerless under the provisions of the constitution cited to pass future laws releasing itself from assumed obligations, but this is not one of them. The state had no power to divest itself of the right of eminent domain by any act it might pass which would prevent the exercise of that right in the future, when in the opinion of the legislature a case arose wherein the public interest demanded the exercise of the power."

In conclusion it seems:

1. That a state may remit taxes by a valid contract.

2. That it may grant monopolies, provided they do not relate to business which every one may engage in.

3. That it cannot make a contract which impairs the police power.

4. That the state cannot bargain away the exercise of the power of eminent domain.

5. That there are certain limitations on legislative power, (1) the Constitution of the United States, (2) of a state, (3) *sometimes*, the common law.

JAMES P. ROOT.

RECENT AMERICAN DECISIONS.

Supreme Court of Indiana.

FLETCHER *v.* SHARPE.

Equity will follow a fund through any number of transmutations and preserve and protect it for the real beneficiary, so long as such fund can be identified and followed.

But equity will not follow trust funds properly deposited in a bank by the trustee, when the bank fails, in order to compel its payment in full, if the assets are not sufficient to pay all the depositors.

When deposits are received, unless they are special deposits, they belong to the bank as a part of its general funds, and the relation of debtor and creditor arises between the bank and the depositor.

APPEAL from the Marion Superior Court.

J. P. Baker and *F. Winter*, for appellants.

Harrison, Miller & Elam, for appellees.

The opinion of the court was delivered by

MITCHELL, J.—Prior to the 15th day of July 1884, Fletcher & Sharpe were engaged as partners in conducting a general banking business in the city of Indianapolis. Having conducted the bank to insolvency, they procured the Marion Superior Court to take the administration of its affairs, by mutually consenting that one of the judges of that court should appoint a receiver, and take possession of its assets. Through its receiver the court continues in the administration of the insolvent concern.

On the 29th day of September 1884, while the affairs of the bank were thus in the custody of the court, Mahlan H. Floyd and Jay G. Voss, administrators of the estate of Gustavus H. Voss, in an intervening petition to the court, alleged that soon after their appointment they had, as such administrators, deposited in the Fletcher & Sharpe bank about $40,000 of the funds of the estate for safekeeping. They alleged that, at the time of receiving such fund, Fletcher & Sharpe had full notice that it belonged to the estate, and that the same was placed in their custody by the petitioners in their trust capacity, and they aver that the fund was so received by Fletcher & Sharpe. The petition alleges the subsequent insolvency of the bank, and the appointment of William Wallace as receiver, and that, as such receiver, he has the possession of its assets. It is shown that about $22,000 of the money so deposited remained in the bank at the time of its suspension. The petitioners aver that the receiver has in his possession a large amount of assets, consisting of bills receivable and choses in action, in which Fletcher & Sharpe had wrongfuily invested the moneys so deposited by the petitioners. They ask that the court shall order the receiver to pay over to them the full sum of money so deposited, and yet remaining unpaid by the bank at the date of its suspension. An issue was made by a denial on behalf of the receiver, and upon a hearing the prayer of the petition was denied, and judgment rendered that the petitioners take nothing.

The question arises upon the evidence. There was no disagreement as to the material facts in the case. The funds were deposited in the bank, from time to time, to the credit of the petitioners. It may be assumed that the account was opened and continued on the books of the bank in the name of the petitioners, as administrators of the estate of Voss, although this does not very distinctly appear. It does appear, however, that Fletcher & Sharpe were

notified, when the first deposit was made, that the funds thus deposited, and such as should thereafter be deposited by the petitioners, were and would be the funds of the estate, and a trust fund, and that no checks would be drawn upon it, except for the purpose of the estate, and that all checks would be signed by the petitioners as administrators. An ordinary bank-account of debt and credit was kept; the petitioners having the customary pass-book evidencing the amount of their deposits from time to time. When the bank suspended, the amount due the petitioners on their account was $22,042.52. There was a sufficient sum of money went into the hands of the receiver, when he took possession, to have paid the amount due the petitioners. The total amount of assets was about $500,000; the liabilities aggregated $1,500,000.

Upon this state of facts it is now argued that the petitioners were entitled to an order giving them a preference over other general depositors. Whether the loss to the fund occasioned by the suspension and insolvency of the bank will ultimately fall upon the petitioners, is a question in no way directly involved in the decision of this case. The principles which determine the liability of trustees who become depositors of trust funds were considered, to some extent, in the case of *Naltner* v. *Dolan*, 8 N. E. Rep. 289, and cases cited. Nor does the case involve any question as to the right of the bank to appropriate the fund for an indebtedness due from the depositors, as in *Bundy* v. *Town of Monticello*, 84 Ind. 119.

There are many cases in which the question has arisen as to the equitable rights of *cestuis que trust* to purpose a trust fund which has been misapplied or diverted by the trustee, or which the creditors of the latter are seeking to subject or appropriate to the payment of debts due them. The general doctrine is well established that equity will follow a fund through any number of transmutations, and preserve and protect it for the real beneficiary so long as such fund can be identified and followed: *Nat. Bank* v. *Ins. Co.*, 104 U. S. 54; *Pennell* v. *Deffell*, 4 DeG., M. & G. 372; *Frith* v. *Cartland*, 2 Hem. & M. 417; *Knatchbull* v. *Hallett*, 13 Ch. Div. 696; *Taylor* v. *Plumer*, 3 Maule & S. 562; *Farmers' Bank* v. *King*, 57 Penn. St. 202; *Van Alen* v. *American Bank*, 52 N. Y. 1; *Naltner* v. *Dolan*, *supra*.

The class of cases above cited are relied upon by the appellant for a reversal of the ruling below. The distinction between the cases relied on and the case being considered is obvious. Those

were cases in which the aid of a court of equity was invoked by the rightful owners to preserve a trust fund from misappropriation by a trustee of his creditors. This is a case in which trustees, with others, have become general depositors in a bank which has become insolvent, and whose assets are now in the hands of a receiver for distribution among all its creditors according to law. The question is, do persons who become general depositors of trust funds in such manner as to create the relation of debtor and creditor between themselves and the bank in which the funds are deposited, stand upon a different level from other general depositors?

There is no question but what the funds were properly deposited. The propriety of the conduct of the trustees in making the deposit, or of the bank in receiving it, is not in dispute, nor does the evidence suggest any wrongful misappropriation or diversion of the fund either by the bank or the trustees. When deposits are received, unless they are special deposits, they belong to the bank as a part of its general funds, and the relation of debtor and creditor arises between the bank and the depositor. This is equally so whether the deposit is of trust money or funds which are impressed with no trust, provided the act of depositing is no misappropriation of the fund. If, in receiving a trust fund, a bank acted with knowledge that it was taking the fund in violation of the duty of the trustee, the rights of the *cestui que trust* might be different. In respect to such a case we decide nothing here. In this case, where no impropriety is imputed to the bank in receiving the money, it becomes the debtor of the petitioners, and its debt to them was of the same character as its debt to any other depositor, and must be paid in the same proportion. The rights of other creditors stand on a level with those of the petitioners, and are to be guarded and protected by the court with the same vigilance: *McLain* v. *Wallace*, 103 Ind. 563; S. C. 5 N. E. Rep. 911; *Nat. Bank* v. *Ellicott*, 31 Kan. 173; S. C. 1 Pac. Rep. 593; *Ætna Nat. Bank* v. *Fourth Nat. Bank*, 46 N. Y. 82; *Att'y-Gen.* v. *Ins. Co.*, 71 N. Y. 325; *Bank of Republic* v. *Millard*, 10 Wall. 152.

There was no error. The judgment is affirmed, with costs.

When a depositor places money in a bank, what is the relation between the depositor and the bank? This question has been answered by a number of courts by stating that it is simply that of debtor and creditor. Thus Mr. Justice DAVIS, in the case of the *Bank of Republic* v. *Millard*, 10 Wall. 152, said: "It is no longer an open question in this court since the decision in the cases of the *Ma-*

rine Bank v. *The Fulton Bank*, 2 Wall. 252; and of *Thompson* v. *Riggs*, *supra*, that the relation of bank and customer in their pecuniary dealings is that of debtor and creditor. It is an important part of the business of a bank to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, and become part of its general fund, and can be loaned by it as their money. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge its debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one and has nothing of the nature of a trust in it."

"The right of a depositor, as was said by an eminent judge, is a chose in action, and it does not further the debt and give a lien upon it to a third person without the assent of the depositor. This is a well-established principle of law and is sustained by the English and American authorities."

In New York, it was said: "The relation of banker and depositor is that of creditor and debtor. Deposits on general account belong to the bank as part of its general fund. The bank becomes a debtor to the depositor to the amount thereof, and the debt can only be discharged by payment to the depositor or pursuant to his order. Until payment or acceptance by the bank of a depositor's check, or assignment of the credit by the depositor and notice to the bank, the deposit is subject to his order:" *Lunt* v. *Bank of North America*, 49 Barb. 221.

So in Massachusetts, in the case of *Carr* v. *Nat. Security Bank*, 107 Mass. 45, Justice GRAY, who delivered the opinion, speaking of general deposits, observed that "Money deposited becomes the absolute property of the bankers, impressed with no trust, and which they may dispose of at their pleasure, subject only to their personal obligation to pay an equivalent sum upon his demand or order. The right of the bankers to use the money for their own benefit, is the very consideration for their promise to the depositor. They make no agreement with the holder of his checks. A check drawn by the depositor in common form, not designating any special fund out of which it is to be paid, not corresponding to the whole amount due him from the bankers at the time, is a mere contract between the drawer and the payee, on which, if payable to bearer and not paid by the drawees, the holder might doubtless sue the drawer, but which passes no title, legal or equitable, to the payee or holder in the moneys previously paid to the bankers by the drawer."

This is the language of all the cases, upon this subject with respect to the relation of a general depositor and the bank: *Thompson* v. *Riggs*, 5 Wall. 663; *The First Nat. Bank of Washington* v. *Whitman*, 4 Otto 343; *Dickinson* v. *Coates*, 23 Am. L. Reg. 181; *Merchants' Nat. Bank* v. *Coats*, Id. 188, and note.

Thus in *Foley* v. *Hill*, 2 H. L. 28, it was held that the relation of banker and creditor who pay money into the bank is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honor the customer's drafts; and that relation is not altered by an agreement by the banker to allow the customer interest on the balance in the bank. See *McEwen* v. *Davis*, 39 Ind. 109; *The State* v. *Clark*, 4 Id. 315; *Coffin* v. *Anderson*, 4 Blackf. 395; *In Matter of Franklin Bank*, 1 Paige 249; s. c. 9 Am. Dec. 413; *Corbit* v. *Bank*, 34 Barb. 298; *Corbit* v. *Bank of Smyrna*, 2 Harr. 235; *Marsh* v. *Oneida Cent. Bank*, 34 Barb. 298; *Lund* v. *Seamen's Bank*, 37 Id. 129; *Allen* v. *Fourth Nat. Bank*, 5 Jones & Sp. 137; s. c. 59 N. Y. 12; *Chapman* v. *White*, 6 Id. 412; *Ætna Nat. Bank* v. *Fourth Nat. Bank*, 46 Id. 82; s. c. 7 Am. Rep. 314; *Bank of Northern Liberties* v. *Jones*, 41 Penn. St. 536;

Coffin v. *Anderson*, 4 Blackf. 395; *Wray* v. *Ins. Co.*, 34 Ala. 58; *Boyden* v. *Bank of Cape Fear*, 65 N. C. 13; *Robinson* v. *Gardiner*, 18 Gratt. 509; *Knecht* v. *U.S. Savings Inst.*, 2 Mo. App. 563; *Garnett* v. *McKewan*, L. R., 8 Exch. 10; s. c. 4 Moak's Eng. 419; *Foley* v. *Hill*, 2 H. L. Cas. 28; *Sims* v. *Bond*, 2 Nev. & M. 608; s. c. 6 B. & Ald. 392; *Carr* v. *Carr*, 1 Mer. 541; *Goodwin* v. *Robarts*, L. R., 10 Exch. 351; *Watts* v. *Christie*, 11 Beav. 546; *Devaynes* v. *Noble*, 1 Mer. 569; *Pott* v. *Clegg*, 16 Mees. & W. 321: *Planters' Bank* v. *Union Bank*, 16 Wall. 483; *Nat. Bank* v. *Conn. Mut. Life Ins. Co.*, 14 Otto 54.

If money, checks or bills be deposited generally, and are lost, destroyed, stolen or become worthless, the bank sustains the loss: *Matter of Franklin Bank*, 1 Paige 249.

When a general deposit is made, the transaction may be effected by a number of extraneous circumstances; for instance, the depositor may be a mere trustee, holding the money in a fiduciary capacity, or at the time the bank receives the money it may be wholly insolvent. In the latter case its insolvency may not be known to the bank or to its officers at the time the money is received, or the bank may receive the money believing that it may be able to pay it back when demanded; or it may receive it knowing at the time of its reception that it will not be able to refund it in whole when demanded by depositor. If the money is paid in by a trustee, the bank may or may not know of the capacity in which he holds it. All these are material questions to be inquired into when it is endeavored to follow it as a trust fund, to compel its refunding as such a fund.

And it should also be noticed here that there is a difference between money held by a trustee which he has rightfully deposited in a bank, and the money which he has acquired by a violation of his trust; as where he has converted trust property into money, and deposited it in the bank. In the first instance, where a trustee is a general depositor, he is to be treated as any other general depositor putting his own money into the bank, but where he has violated his trust, the money is impressed with the fiduciary capacity in which he held it, and it can be traced and reclaimed in whosesoever's hands it may come with notice of its character.

First. As an illustration of what has been previously said, we cite the case of *McLain* v. *Wallace*, 103 Ind. 562. McLain was clerk of the Circuit Court, and had on deposit in a bank, in the name of "Moses G. McLain, clerk," a large sum of money, subject to his order as such clerk. The bank failed, and he sought to recover back the full amount upon the ground that he held it as a trustee,—the money being certain sums which had come into his hands by virtue of his holding the position of clerk. This was refused by the court, and in rendering an opinion it said: "The question is what are the rights of a bank-depositor, when the bank becomes insolvent? Deposits in bank are either general or special. Upon a special deposit the bank is merely a bailee, and is bound according to the terms of the special deposit; but on a general deposit, without special agreement, the money becomes the property of the bank, and the depositor has no longer any claim on the money: his claim is on the bank for a like amount of money. Upon the insolvency of a bank, its general depositors must be paid *pra rata.* The rule that a trustee may follow trust property as long as it can be traced, is not applicable to such a case. The addition of the work "clerk" to the name of a general depositor, does not make the deposit a special one, nor does it change the liability of the bank."

In the case of the *St. Louis, &c., Rd. Co.* v. *Johnston, Receiver*, 27 Fed. Rep. 243, the facts were as follows: A., who had for several years kept an account with the Marine National Bank of New

York, deposited on the fifth day of May, 1884, a sight draft dated that day, and drawn by him on a corporation of Boston, which was indebted to him in the amount of the draft. The bank was insolvent at the time. It forwarded and collected the draft May the seventh, but not until the bank had closed its doors. The draft was deposited and credited to the depositor as a cash item. It was held by Judge WALLACE, that the draft was not the property of A. when paid by the payee, and that he was not entitled to recover the amount thereof from the receiver. It was also further held that when such a trust is credited by the banker to a customer as a cash item, with the latter's assent, the transaction is equivalent to the discount of the bill of the bank. In the case of the *Metropolitan National Bank* v. *Loyd*, 90 N. Y. 530, the court says, "By the acceptance of a check by a bank receiving it as so much money, it becomes debtor to the customer to the extent of the amount credited in account on account of it, and while he did not draw checks or drafts against it, but the bank was largely his debtor, he still had a right to do it if he had been so disposed. The account, including the amount of check, stood with his assent as so much money subject to his disposal, and because of that circumstance, he ceased to be the owner of the check, and the title of it became vested in the bank as its own property, subject to its risk in case of loss."

In *Titus* v. *Merchants' Bank*, 6 Vroom 588, checks and cash were deposited, and all were credited as cash. The checks "were received and credited in the cash account as cash in part payment of an over-draft, and in part to be drawn against. They were received and credited in the same way as bills or notes of other banks. By such crediting, the bank became the owner of such bills, as they do the legal owner of bank bills so deposited, and had the defendants failed the next day, the plaintiff could not have recovered these identical checks as their property left for collection, against the receiver or the assignee in bankruptcy."

Touching on this point, we cite *The People* v. *Merchants' and Mechanics' Bank of Troy*, 78 N. Y. 269 ; *In re Le Blanc*, 14 Hun 8 ; *Metropolitan Bank* v. *Loyd*, 25 Id. 101 ; *Ellicott* v. *Barnes*, 31 Kan. 170 : S. C. First Pac. Rep. 767 ; *McComas* v. *Long*, 85 Ind. 549 ; *In the matter of West of England and South Wales District Bank*, L. R., 11 Ch. Div. 772.

But it may happen that the money is deposited merely by an agent. Thus a banker's lien ordinarily attaches in favor of the bank, upon the securities and moneys of the customer, deposited in the usual course of business, for advances which are supposed to be made upon their credit, not only against the depositor, but against the unknown equities of all others in interest; but this cannot be permitted to prevail against the equity of the beneficial owner, of which the bank has notice either aetual or constructive. Thus when a bank account is opened in the name of the depositor as the general agent, and it is known to the bank that he is the agent of an insurance company: that conducting its agency is his chief business; that the account was opened to facilitate that business, and used as a means of accumulating the premiums of policies collected by him for it, and by making payments to it by checks ; the bank is chargeable with notice of the equitable rights of the company, although the depositor deposited his moneys in the same account and drew checks upon it for his private use. And the insurance company may enforce, by bill in equity, its beneficial ownership therein against the bank, claiming a lien upon the balance thereof for a debt due to it from the depositor, contracted for his individual use: *Central National Bank of Baltimore* v. *Connecticut Mut. Life Ins. Co.*, 14 Otto 54.

So in the case of *Bailey* v. *Finch*, L.

R., 7 Q. B. 34, the plaintiff, as trustee of a bankrupt banking firm, sought to recover a balance of the banking account which had been overdrawn. The defendant sought to set off a balance due to him as executor of A., in which name he had another account, and proved that as residuary legatee, he was beneficially entitled to this balance, the legatees being otherwise satisfied. It was held that the effect of the account being in the name of the executor was to affect the bank with notice if there were any equities attaching to the fund; but that under the circumstances there were no such equities as to prevent the defendant from treating the balance as a fund to which he was beneficially, as well as legally, entitled, and that, consequently, he was entitled to set it against the plaintiff's claim. Chief Justice COCKBURN said: "There can be no doubt that in point of law, the estate and effects of the deceased testatrix pass to the defendant as executor. And, although it may be for his convenience to open an account in his own name as executor, instead of his own name as private customer, the whole effect of that is, I apprehend, to affect the bank with the knowledge of the character in which he holds the money. Therefore, if there were persons beneficially interested in that fund, the bank might be liable to be restrained by proceedings in equity from dealing with the fund as if it were one in which their customer, the defendant, was beneficially interested, absolutely without reference to any trust or beneficial interest to which it was subject." In the same case, BLACKBURN, J., said, that opening the account as executor operated "as a notice to them as a statement to a bank: 'This account which I am opening is not my own limited property, but it is money which belongs to the estate which I am administering as executor; consequently, there may be persons who have equitable claims upon it.' The bank would have been bound by an equity which did exist, of which they had notice at the time the bank became bankrupt."

In the case of *Pannell* v. *Hurley*, 2 Coll. Ch. C. 241, the depositor having two accounts, one in trust the other in his own name, drew his check as trustee to pay his private debt to the banker. The vice-chancellor put the case as follows: "Money is due from A. to B., in trust for C. B. is indebted to A. on his own account. A. with the knowledge of the trust concurs with B. in setting one debt against the other, which is done without C.'s consent. Can it be a question in equity whether such a transaction can stand?"

In *Shaw* v. *Spencer*, 100 Mass. 382, certain certificates of stock were endorsed, "E. Carter, trustee," and were thus transferred to the holder for value and without actual notice that they were held by Carter as trustee. The question arose whether the word "trustee" imparted notice to the holder; and the court held that it did, saying that "unless the word trustee may be regarded as mere *descriptio personæ* and rejected as a nullity, there was plain and actual notice of the existence of the trust, and of some description. * * * And that the mere use of the word 'trustee' in the assignment of the mortgage and note imports the existence of the trust and gives notice thereof to all into whose hands the instrument comes, as has been expressly decided by this court."

So in the case of *Bundy* v. *The Town of Monticello*, 84 Ind. 119, a trustee of the town had rightfully sold its bonds and deposited the money received in a bank, which was credited to him as "J. C. W., trustee." The bank failed; it was held that the town was entitled to recover the full amount of the bank remaining to his credit, although the general creditors would receive but a small percentage of the amount of their deposits.

The case of *Baker* v. *The N. Y. Nat. Exchange Bank*, 100 N. Y. 31; S. C.

2 N. E. Rep. 452; affords another example of this branch of the subject. In that case certain consignees to whom goods had been sent for sale, were insolvent, and they deposited the amount due their consignors on such goods in the bank in their own name, adding "agents" for the purpose of protecting their principals, and entered the deposit as a trust fund, with the knowledge of the bank; and afterwards drew a check upon the bank in settlement of the balance due to their principals upon such cash sales made by them as their agents. The bank received and honored the check, treating the funds as the property of the agents of the consignees, and to this the depositors consented. It was held that the bank must honor the check, although the money deposited was not the specific proceeds of such sales; that it would not avail the bank as a defence to an action by the consignors on refusal to pay the check that the account represented not only the proceeds of the consignors goods but of other persons not before the court. The court said the "title to the goods until sold remains in the principal; and when sold the proceeds, whether in the form of money or goods or other securities, belong to him, subject to a lien of the commission agent for advances and other charges. The agent holds both the goods and the proceeds upon an implied trust to dispose of the goods according to the direction of the principal, and to account for and to pay over to him the proceeds from sales. The relation between the parties in respect to the proceeds of sales is not that of debtor and creditor simply. The money and securities are specifically the property of the principal, and he may follow and reclaim them as long as the identity is not lost, subject to the rights of a *bona fide* purchaser for value. In case of the bankruptcy of the agent, neither the goods nor their proceeds would pass to his assignees in bankruptcy for general administration, but would be subject to the paramount claim of the principal. Those principles seem to be well established."

Third. Another question in which it may be sought to reclaim moneyis where a deposit has been made in a bank at a time that it is in an insolvent condition. If the bank took the money, knowing at the time that it was insolvent, and that there was no probability of its being able to refund the full amount when demanded by the depositor, it commits a palpable fraud upon him, and the title of the money no more passes than if an insolvent purchaser should buy goods knowing that he would not be able to pay for them; or if he were to buy them not having any intention to pay for their value. In neither case would the title pass, and in both instances the purchaser and depositor might recover back the thing sold or the money deposited; but if the bank knew it was insolvent, yet had grounds to believe that it would be able to refund the money in full at any time the depositor might demand it, then no fraud was committed, and the depositor in such an instance does not stand in the same position as if the bank had knowingly committed a fraud upon him. Thus, in *Terhune* v. *The Bank*, 34 N.J. Eq. 367, the facts were as follows: On Tuesday, Nov. 9th 1886, the directors of a bank discovered that the cashier had embezzled its funds, but not to such an extent as were then supposed, so as to render the bank insolvent, and they continued business. On the next day a customer of the bank deposited money and checks of another bank, and these checks were credited as so much cash in his pass-book, and on Thursday the bank failed; it was held that he could not recover the amount deposited, and that he would be treated as a general creditor.

Fourth. It has been said by an eminent authority, that "the general proposition which is maintained both at law and in equity upon this subject, is, that if any

property in its original state and form, is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust, or give the agent or trustee converting it, or those who represent him in right (not being *bona fide* purchasers for a valuable consideration without notice), any more valid claim in respect to it than they respectively had before such change;" 2 Story Eq., sect. 1258. Following this principle, it was held in *Van Alen* v. *American National Bank*, 52 N. Y. 1, that where agents sold bonds for their principal, and received a check in payment and applied it to their own use, and they immediately deposited money in the bank for their principal, that the principal could recover the amount of the bank, and the bank could not hold it against him on the ground that the agents owed it.

The court, after saying that the proceeds of the trust fund may be followed and recovered, said: "It is claimed, however, that this principle is not applicable, because the identical money for which the bonds were sold was not deposited. This objection would be fatal if there had in fact been no substitution of other money for the proceeds of the bonds. * * * The point made, is this: A., having $100, the proceeds of a sale of property of B., intends to place it in a repository and keep it for B., and instead of putting the identical bank bills in the designated place, substitutes others of the same amount and keeps them for B. as such proceeds, can there be a doubt that the $100 thus substituted would occupy the same position as the particular bills obtained for the property, and that they would be impressed with the same trust? Suppose Van Alen and Rice had got the check cashed by a third person and deposited the money, it would of course be regarded as the proceeds of the check, and belong to the plaintiff as effectually as the check itself. Does it make any difference whether the money was obtained from a third person upon the check, or from the safe of Van Alen and Rice? In either case the money is the proceeds of the check and stands in lieu of it."

This is a question where the agent owed a fiduciary relation to the fund, and its relationship has been defined as follows: "It is one in respect to which if wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*:" *Ex parte Dale & Co.*, 11 Ch. Div. 778.

In the case just cited, Chief Justice FRY disapproves of the principle which permitted the following of the trust fund when that fund had been mingled with the moneys of the trustee, instead of being separately deposited in the bank or in other places of security. Afterwards the entire subject was discussed in *The Matter of Hallett*, 13 Ch. Div. 696; it was there decided that if money held by a person in a fiduciary character, though not as a trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, although it was mixed with his own moneys; and in that particular the court overruled the opinion in *Ex parte Dale*. It was also held that the rule in *Devaynes* v. *Noble*, (*Clayton's Case*), 1 Mer. 572, appropriating the first drawings to the first payments, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money; and in that particular, *Pennell* v. *Deffell*, 4 DeG., M. & G. 372, was not followed. The Master of the Rolls, in speaking of the general doctrines of equity, allowing the trust fund to be followed, and referring to the old rule upon this subject, said: "The modern doctrine of equity as regards property disposed of by a person in a fiduciary position, is very clear and well settled. You can, if the sale was rightful, take the proceeds of the sale, if

you can identify them. If the sale was wrongful you can still take the proceeds of the sale in a sense adopting the sale for the purpose of taking the proceeds, if you can identify them—there is no distinction, therefore, between a rightful and a wrongful disposition of the property so far as regards the right of the beneficial owner."

In the case of *Ex parte Richdale*, 19 Ch. Div. 409, it was held that when a customer pays a check to his banker with the intention that the amount of it shall be at once placed to his credit, and the bankers carry the amount to his credit accordingly, they become immediately holders of the check for value, even though the customer's account is not overdrawn.

The case of *Balbach* v. *Frelinghuysen*, 15 Fed. Rep. 675, arose in New Jersey. In that case it was held as follows: that checks deposited in a bank by the customer for collection, do not at once become the property of the bank; the bank continues to be the agent of the customer until the collection of the check, which remains, in the meantime, the property of the depositor.

The rule is different when such checks are deposited to make good an overdrawn account of the customer, or when the amount deposited by check is immediately drawn against it: in that case, the bank may hold the deposit until the overdraft is made good from the same.

The endorsement by the customer of a check, deposited for collection, is only intended to put the property in such shape that the bank may collect it, and not to thereby pass the title to the bank. The practice which has grown up among banks to credit deposits of checks at once to the account of the depositor, and to allow him to draw against them before the collection, is a mere gratuitous privilege, which does not grow into a binding legal usage.

The plaintiff sought to offset the amount of their credit on the books of a defunct bank, against the promissory notes received by the bank for discount before its failure. It was held, that if the bank held the notes at the time of its failure, and was entitled to reeeive the amounts due thereon when they matured, such offset might be made; but an offset of this kind could not be allowed where it appears that the notes were not the property of the bank at the time of its failure, but had been endorsed away for value.

No knowledge by any of the officers of a bank of its insolvency is sufficient to avoid a transaction between the bank and the customers, on the ground of fraud, unless the evidence clearly shows that the directors, who represent the corporation, also had such knowledge. See also *Hoffman* v. *First National Bank*, 20 Rep. 113; *German-American Bank* v. *Third National Bank of Missouri*, 18 Alb. L. J. 252; *Bank* v. *King*, 57 Penn. St. 202.

The following language used by the Master of Rolls in *Ex parte Dale*, *supra*, is instructive: "Supposing the trust money was 1000 sovereigns, and the trustee put them into a bag, and, by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag, could anybody suppose that a judge in equity would find any difficulty in saying that the *cestui que trust* has a right to take 1000 sovereigns out of that bag? I do not like to call it a charge of 1000 sovereigns or the 1001 sovereigns, but that is the effect of it. I have no doubt of it. It would make no difference if, instead of one sovereign, it was another 1000 sovereigns; but if, instead of putting it into his bag, or, after putting it into his bag, he carries the bag to his bankers, what then? According to law, the bankers are his debtor for the total amount; but if you lend the trust money to a third person, you can follow it. If, in the case supposed, the trustee had lent the 1000 sovereigns to a man, without security, you could follow the debt and

take it from the debtor. If he lent it on a promissory note, you could take the promissory note; or the bond, if it was a bond. If, instead of lending the whole amount in one sum simply, he had added a sovereign, or had added 500 of his own to the 1000 sovereigns, the only difference is this, that, instead of taking the bond or promissory note, the *cestui que trust* would have a charge for the amount of the trust money on the bond or promissory note. So it would be on the simple contract debt; that is, if the debt were of such a nature as that between the creditor and the debtor, you could divide the debt into two, so as to show what part was trust money, then the *cestui que trust* would have a right to a charge upon the whole."

Again the Master of the Rolls said: "The moment you get a substantial portion of it [the money] furnished by the trustee, using the word "trustee" in the sense I have mentioned, as including all persons in a fiduciary relation, the right to the charge follows. That is the modern doctrine of equity. Has it ever been suggested until very recently, that there is a distinction between an express trustee, or an agent, or a bailee, or a collector of notes, or anybody else in a fiduciary position? I have never heard, until quite recently, such a distinction suggested. * * * It can have no foundation in principle, because the beneficial ownership is the same, wherever the legal ownership may be. If you have goods bargained and sold to a man upon trust to sell and hand over the net proceeds to another, that other is the beneficial owner; but if instead of being bargained and sold, so as to vest the legal ownership in the trustee, they are deposited with him as agent, so that the legal ownership remains in the beneficial owner, can it be supposed, in a court of equity, that the rights of the beneficial owner are different, he being the entire beneficial owner in both cases? I say on principle it is impossible to imagine there can be any difference. In practice we know there is no difference, because the moment you get into a court of equity, where a principal can sue an agent as well as a *cestui que trust* can sue a trustee, no such distinction was ever suggested, as far as I am aware. Therefore, the moment you establish the fiduciary relation, the modern rules of equity, as regards following trust money, apply.

"I will take the case of a pure bailee. If the bailee sells the goods bailed, the bailor can in equity follow the proceeds, and can follow the proceeds wherever they can be distinguished, either being actually kept separate, or being mixed up with other moneys. I have only to advert to one other point, and that is this, supposing, instead of being invested in the purchase of lands or goods, the moneys were simply mixed with other moneys of the trustee, using the term again in its full sense as including every person in a fiduciary relation, does it make any difference according to the modern doctrine of equity? I say none. It would be very remarkable if it were to do so."

In this conflict of authority, whom shall we follow? It seems to the writer that the rule contended for by the Master of the Rolls, *In the matter of Hallett*, *supra*, is the proper one. Why should the distinction be drawn between a perverted trust fund, and one that is not? If you follow a fund that has been perverted by the trustee, why not a fund that has not? Is the equity of the receiver of a fund which has been perverted any stronger than the receiver of a fund that has not been perverted? Why should it be necessary that a tort should be committed upon the fund before the beneficiary can follow it? The only assignable reason is, that in the latter instance, the actual owner never consented that the fund should be placed in the hands of its custodian; while in the former there is an assent on his part implied by law. Why we should make a difference, or why this

fund should be more favored than the other, it is difficult to see. The true rule is that if the fund is impressed with the character of a trust fund it can be followed; if it is not, it cannot be recovered.

W. W. THORNTON.
Crawfordsville, Ind.

Supreme Court of Pennsylvania.

POWELL *v*. COMMONWEALTH.

The General Assembly is invested with full power to legislate for the protection of the public health, or to prevent the adulteration of articles of food, as well as imposition or fraud in the sale of such articles. In the absence of any constitutional inhibition or limitation, the sovereign power of the state to enact laws for the public good, appears to embrace these subjects of legislation; but, however, that may be, they are fairly within the police powers of the state.

Under the police power the legislature may prohibit the manufacture, sale and keeping with intent to sell a substance designed to take the place of another as an article of food, if in their judgment the protection of the public from injury or fraud requires it.

The judiciary may not pass upon the wisdom or necessity of the legislative prohibition, and the fact that the prohibited substance in a pure state may be wholesome is irrelevant to the question of the constitutionality of an Act of Assembly prohibiting its manufacture and sale.

The Act of Assembly of Pennsylvania of 21st May 1885, P. L. 22, entitled "An act for the protection of the public health, and to prevent adulteration of dairy products, and fraud in the sale thereof," and which prohibited the manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take the place of butter or cheese, produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, and which prohibited also the sale, offer of sale, or possession with intent to sell such substance as an article of food: *Held*, constitutional.

ERROR to the Court of Quarter Sessions of Dauphin county.

D. T. Watson and *Weiss* and *Gilbert*, for plaintiff in error.

F. Carroll Brewster and *R. C. McMurtrie*, for certain manufacturers and dealers.

Hall & Jordan, *S. J. M. McCarrell* and *Wayne MacVeagh*, for defendant in error.

The opinion of the court was delivered by

STERETT, J.—In his opinion overruling the motion for a new trial and in arrest of judgment, the learned president of the Quarter Sessions has so fully and conclusively vindicated the correctness